Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1402

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCES CORPORATION,

Petitioners,

vs.

CECIL ANDRUS, Secretary of the Interior,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SNOW, CHRISTENSEN & MARTINEAU

Michael Carlston

700 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Petitioner

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 15, 1978.

CITATIONS TO OPINIONS BELOW

The unreported Findings of Fact and Conclusions of Law and Judgment of the trial court, U.S. District Court for the District of Utah, Central Division, are printed in the Appendix at page A-1 et seq.

The Opinion of the Tenth Circuit Court of Appeals which is not yet published is printed in the Appendix at page A-21 et seq.

JURISDICTION

The Judgment of the Tenth Circuit Court of Appeals was entered on February 15, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did the Tenth Circuit Court of Appeals err in holding that estoppel would not lie against the federal government when all elements of estoppel were present and where there was no detriment to the public?

2. Did the Tenth Circuit Court of Appeals err in overturning the findings of the trial court when such findings were supported by the evidence and were not clearly erroneous?

STATEMENT OF THE CASE

This action was commenced by plaintiffs Ray H. Albrechtsen and Mountain States Resources Corporation against the Secretary of the Interior to obtain the issuance of certain coal prospecting permits to plaintiffs under the terms of the Mineral Leasing Act of 1920, 30 U.S.C. §201(b) and pursuant to representations made by governmental officials.

On February 10, 1976, the Honorable Willis W. Ritter, sitting without a jury, heard evidence presented by both parties and rendered judgment against the defendant ordering the reinstatement of plaintiffs' coal prospecting permit applications, and further ordering, with respect to the portions of the permits the Government had earlier indicated it would issue, that the plaintiffs should have 30 days to comply with the conditions necessary for issuance, and finally ordering that the Secretary make a proper

determination as to whether a formal environmental impact statement should be prepared.

The Tenth Circuit Court of Appeals reversed this decision and remanded this case to the District Court with directions that the trial court dismiss the action and enter judgment in favor of the Secretary.

The majority of facts in the record are undisputed. Plaintiffs filed applications for coal prospecting permits in 1968 and 1970 under the Mineral Leasing Act of 1920, 30 U.S.C. §201(b). Certain applications were rejected and others, Nos. U-5140, U-5141, U-5142 and U-6190 were rejected in part, with the provision that significant portions "may be allowed" upon the condition of receipt of bond with approved surety and the execution of certain stipulations. The decisions provided:

> Thirty days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken within the time allowed, the case will be closed on the records of this office, as to the available lands, without further notice.

In addition to informing plaintiffs that they had the right to appeal within 30 days, the decisions also provided that any appeal would be in accordance with the regulations contained in 43 C.F.R., Subpart 1842. These decisions were signed by either Ed Cox as Acting Chief or F. S. Kirk, as Chief of the Adjudication Branch of the Salt Lake Office, Bureau of Land Management.

Plaintiff Albrechtsen's brother, Dan Hunter, received similar decisions at the same time concerning other coal prospecting applications which he had filed with the Department. Both brothers assigned an interest in these applications to plaintiff Mountain States Resources.

The decisions in question were ambiguous and vague as to what procedure should be followed with respect to applications rejected in part and provisionally granted in part. Hunter and Albrechtsen consulted with their attorney as to the procedure to be employed, since both obviously desired to obtain permits on the approved lands as soon as possible, and also wished to appeal the rejected portions.

From the information available, including the regulations, neither the applicants nor their attorney could determine what procedure should be followed to obtain immediate issuance of the approved permits, and to simultaneously appeal the rejected portions. Accordingly, a meeting was arranged with officials of the local land office.

A meeting was held in 1968 within a few days after the time the decisions were rendered. Plaintiff Albrechtsen testified that he was told by the Government agents that he could either accept the approved parts and not appeal the rejected parts or appeal the entire decision but that in no event could he appeal part and immediately have access to the part granted. The testimony of the Governmental officials concerning this meeting was inconclusive in that the officials could not recall the meeting in question but did not deny that the meeting occurred.

Plaintiff Albrechtsen further testified that had he known he could have accepted those parts of the application granted he would have done so immediately by posting the necessary bond and other papers required since he or plaintiff Mountain States Resources had an interest in other properties contiguous to those granted in the application.

Testimony was introduced in trial that Albrechtsen decided to appeal the rejected portions of the applications

in reliance upon the representation and advice of these Governmental officials that he could neither immediately obtain the granted permits, nor appeal the rejected portions only. No action was taken, therefore, to comply with the requirements for issuance of permits on the approved areas.

While these applications were on appeal, the Secretary of Interior issued Order No. 2952 which provided for a moratorium in the issuance of coal prospecting permits. Accordingly, the Board of Land Appeals rejected all of Albrechtsen's applications basing this rejection on the aforesaid Order No. 2592.

Albrechtsen initiated this proceeding against the Secretary on the theory that the notice of appeal given to him by the BLM was ambiguous and misleading and that he did not understand from this notice that he could have appealed from that portion of the decision which rejected his application and at the same time could have gone forward and complied with the conditions imposed in connection with the parts of this application which the BLM had indicated "may be approved" when certain conditions were met.

By amended complaint, Albrechtsen alleged that he had also been misled by the BLM officials who had verbally advised him that he could not appeal part of the BLM's decision, and at the same time comply with the condition imposed by another part of BLM's decision. Albrechtsen alleged that the Government was estopped from denying the claims.

The trial court found in favor of Albrechtsen and against the Secretary. Specifically, the trial court found that the written notice of appeal was ambiguous and that

because of such ambiguity, Albrechtsen sought clarification from the BLM and was incorrectly informed by BLM officials that he could not accept, immediately, the favorable portion of the BLM decision and at the same time appeal the unfavorable portion of such decisions. Based upon estoppel, the trial court directed that Albrechtsen be given 30 days to meet such conditions and that the Secretary was restrained from refusing to issue such permits for any reason except a failure by Albrechtsen to comply with the specific requirements contained in the BLM decisions.

The Tenth Circuit Court of Appeals reversed the lower court decision apparently finding that the doctrine of estoppel could not be applied against the Secretary of the Interior in this type of case and further finding that the evidence did not justify a conclusion of estoppel.

The Tenth Circuit Court of Appeals relied heavily upon its previous decision in *Hunter v. Morton*, 529 F.2d 645 (10th Cir. 1976), in which Albrechtsen's brother unsuccessfully attempted to reinstate other coal application permits which had also been rejected by the Secretary. In that case, however, the doctrine of estoppel was not raised in the trial court and no evidence was presented showing the act of the Governmental agents. The Tenth Circuit Court of Appeals in the *Hunter* decision recognized the absence of evidence in the trial court and stated the following:

> The applicant urges that the doctrine of estoppel should be applied against the Secretary. We do not say that this doctrine can never be applied as to public lands, but certainly the facts here advanced do not come close to the requirements which should be imposed. There are, for all practical purposes, no facts in the record before the trial court on this point. The post-appeal affidavits cannot be considered as part of this record. 529 F.2d at 649.

Even though the Circuit Court did not consider the evidence in the *Hunter* opinion, it relied exclusively upon that opinion in concluding that Albrechtsen did not have a right of estoppel against the Federal Government. The Tenth Circuit Court of Appeals stated that Albrechtsen attempted to "escape the rule of Hunter" by filing an amended complaint alleging a stronger case for estoppel. In fact, however, there was no allegation whatsoever in the Hunter complaint filed in the District Court so it could hardly be said that a stronger case for estoppel was being made by Albrechtsen.

The Circuit Court of Appeals relied upon this Court's decision in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), in concluding that the Government could not be estopped by misinformation of its agents. It also relied upon this Court's decision in *Utah Power & Light Company v. United States*, 243 U.S. 389, 409 (1917). This decision was cited as standing for the proposition that neglect of duty on the part of officials of the Government is no defense to a suit to enforce a public right or to protect a public interest.

As a second grounds for denying estoppel, the Circuit court found that the evidence relied upon by the trial court in granting relief was "woefully weak." The Circuit Court noted that only the "uncorroborated self-serving testimony of Albrechtsen himself established the estoppel and that the officials of BLM did not support his testimony." In fact, the officials of BLM could not remember the meeting and did not affirm or deny Albrechtsen's testimony.

The Tenth Circuit Court of Appeals also noted that the notice to Albrechtsen was sufficient to advise him to take some action as to the acreage not rejected if he wanted to move toward a perfected application. The Court stated, "in the instant case, Albrechtsen received the same notice concerning his appeal rights as did the applicant in *Hunter*. Albrechtsen would escape the effect of such notice by his uncorroborated testimony that he was given contrary information by some BLM representative."

The Tenth Circuit Court of Appeals ignored its previous *Hunter* decision concerning this notice in which it stated, "the decisions leave much to be desired in the way of clarity in the notice of right to appeal a portion of the decisions." Furthermore, the Circuit Court ignored the fact that in *Hunter* there was no evidence as to why the accepted applications were not acted upon. In *Hunter*, the Court stated:

> What was done was to proceed with the appeal as to the rejections and nothing else. This is what was done and nothing in the record demonstrates why this was done. In view of the silence on "why" we cannot assume there was any improper or unconstitutional administrative action by the Manager. We can just as well assume the choice by the applicant was made in what was then considered his best interest. 529 F.2d 648.

In the instant case, however, the record was abundantly clear that the "why" for not proceeding on the accepted applications was the statements made by the BLM officials to Albrechtsen that such a procedure was impossible. For this reason, the Hunter case with its incomplete record was inappropriate for the Tenth Circuit Court of Appeals to rely upon in denying sufficient evidentiary proof to establish estoppel.

REASONS FOR GRANTING THE WRIT

In reversing the trial court's decision, the Tenth Circuit Court of Appeals has misread the precedent of this court relating to Governmental estoppel. It has so far departed from the accepted and usual course of judicial proceedings by arbitrarily ignoring the findings of the lower court in a case where no showing of clear error can be made that this Court's power of supervision should be exercised.

1. In relying upon the *Federal Crop Insurance Corporation* case and the *Utah Power & Light Company* case of this Court, the Circuit erroneously failed to distinguish the facts of each of these cases with the facts in the instant case. In the *Federal Crops* case, a Governmental regulation was in effect directly contradicting the advice of the Governmental agent. In that case, this Court held that the regulation was controlling regardless of the agent's erroneous advice to the contrary. In the *Utah Power & Light* case, this Court held that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit. This Court further held that the Government was not estopped from insisting upon compliance with pre-existing rules established for the use of public lands, despite a company's construction of a power plant thereon at great expense as a result of alleged assurances of Government officers and agents upon which it relied.

This case is directly converse to both the *Federal Crops Insurance* case and the *Utah Power & Light* case. Instead of the Government agents representing to the plaintiffs that they were entitled to rights which they were not, the agents here represented to the plaintiffs that

they were not entitled to rights which they actually had, and in a situation where there was no applicable regulation. Thus, as a result of the Government's conduct, plaintiff's were deprived of a valuable opportunity in circumstances where the plaintiffs had no alternative but to place their trust in representations made by the Government's authorized agents.

In addition, the Tenth Circuit Court of Appeals failed to recognize that the only detriment created in this case was to the plaintiffs. This was not an action where the public land or treasury was being attacked since the plaintiffs had already been granted a right to lease certain designated areas of coal production land. The public was in no way affected by the denial of plaintiffs' rights except to the extent that such land would not be rightfully developed for coal production.

The Ninth Circuit Court of Appeals in *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970), held that a Bureau of Land Management statement was so ambiguous that it could not be understood, and estopped the Government from disavowing the misstatement when the effect would have been to preclude the plaintiff from obtaining a right to which she was otherwise entitled. As the Court succinctly stated:

> We cannot now order the Secretary to make a lease but certainly it seems clear to us what would be done. To say to these appellants, "the joke is on you. You shouldn't have trusted us," is hardly worthy of our great Government.
>
> We would have a much different case if the booby trap unwittingly set for Mrs. Brandt and Mrs. Shell had somehow hurt the Government. That advice cannot ordinarily justify giving away to individuals valuable Government assets. This is no such case. 427 F.2d at 57.

Likewise, the Tenth Circuit Court of Appeals erred in failing to note the vital distinctions between this Court's previous decisions and the facts of this case. Appellants, by relying on the Governmental officials, lost a valuable right to which they were clearly entitled under the existing law and suffered a private loss — which had no effect upon the public treasury or public lands. For these reasons, the Tenth Circuit Court's erroneous use of this Court's previous decisions should be corrected in order to avoid further error by other courts, and to prevent a gross misjustice.

2. The Tenth Circuit Court of Appeals violated the well-established rule that an appellate court cannot upset a trial court's factual findings unless it is left with a definite and firm conviction that a clearly erroneous mistake has been committed. *Guzman v. Pichirilo*, 369 U.S. 698 (1962). It is not the place of an appellate court to reappraise the evidence unless it plainly fails to support the findings of the trier of fact. *Roemer v. Maryland Public Works*, 426 U.S. 736, 758 (1976).

The Tenth Circuit Court of Appeals' conclusion that plaintiff's Albrechtsen's testimony was "woefully weak" is obviously an abuse of appellate discretion. The trier of fact chose to believe his testimony especially in light of the fact that the Government officials could not remember the meeting. A review of the transcript in this case shows that the trial court was completely justified in finding that the Governmental agents had erroneously advised Albrechtsen and his attorney as to the procedures to be taken. The record failed to support any clear error made by the finder of fact concerning the estoppel

allegations. For this reason, the appellate court overstepped its bounds in concluding that sufficient evidence was not presented at trial to justify a finding of estoppel.

It is imperative that this Court review the decision of the Tenth Circuit Court of Appeals in order to clearly establish the elements necessary for estoppel against the Government in cases where the law grants a private individual a valuable right but where Government agents impede or prevent exercise of such right through erroneous advice. In addition, a distinction should be made as to a public detriment and a private detriment where only individual rights have been harmed. Finally, the Circuit Court of Appeals should not be allowed to arbitrarily reject the findings of a trial court without establishing the clear error in the trial court's conclusions. These errors mandate a review by this Court.

Respectfully submitted,

SNOW, CHRISTENSEN &
MARTINEAU

Michael Carlston

700 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

JUDGMENT
Civil No. C-392-73

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCES CORPORATION,
Plaintiffs,

vs.

ROGERS C. B. MORTON,
Secretary of the Interior
Defendant.

Separate Motions for Summary Judgment having been filed in the above-entitled matter on behalf of the plaintiffs and on behalf of the defendant and said Motions for Summary Judgment having come on for hearing on March 25, 1975 before the Honorable Willis W. Ritter, Chief Judge, and the Court having heard argument and citation of authorities by counsel for plaintiffs and by counsel for defendant and the Court having requested that counsel for the respective parties submit a written memorandum in support of their respective positions, and said memoranda having been prepared and filed as directed by the Court, and the above-entitled matter having again come on for hearing before the Court on July 14, 1975 on said Motions for Summary Judgment and on plaintiffs' Motion for Leave to File Amended Com-

plaint and the Court again having heard argument of counsel and having further considered the said memoranda and plaintiffs' Motion for Leave to File Amended Complaint having been granted and said Complaint having been filed and the defendant having filed its Answer thereto and the parties through their respective counsel having prepared and filed a Pretrial Order herein, and the Court having signed said Pretrial Order, and the plaintiffs having thereupon renewed their Motion for Summary Judgment and this matter having again come on for hearing before the Court on August 19, 1975 on said Motions for Summary Judgment and counsel for defendant having argued to the Court that factual issues remained with respect to actions of the officials of the Bureau of Land Management and the effect, if any, of such actions on the plaintiffs, and the Motions for Summary Judgment having been denied upon that basis and the above-entitled matter having come on for trial on February 10, 1976 before the Honorable Willis W. Ritter, Chief Judge, and plaintiff Ray H. Albrechtsen having appeared in person and plaintiff Mountain States Resources Corporation having appeared by its president, Ray H. Albrechtsen, and plaintiffs having been represented by their counsel, Reed L. Martineau and Michael R. Carlston of Worsley, Snow & Christensen and defendant having been represented by his counsel, Brent Ward, Assistant United States Attorney, and witnesses having been sworn and testified on behalf of plaintiffs and on behalf of defendant and the respective parties having rested and the matter having been submitted by the respective parties and the Court having considered the testimony of said witnesses and the Court having further considered the entire record in this cause, including the pleadings, stipulations, affidavits, exhibits, interrogatories and answers thereto, and the Court further having

considered the argument of counsel, the memoranda filed on behalf of the respective parties and the decision of the United States Court of Appeals for the Tenth Circuit in the related, but factually distinguishable case, Dan H. Hunter and Mountain States Resources Corporation, Plaintiffs-Appellants vs. Rogers C. B. Morton, Secretary of the Interior, Defendant-Appellee, D.C. # C-393-73, and the Court having now made and entered its Findings of Fact and Conclusions of Law herein, and the Court now being fully advised in the premises, it is hereby

ORDERED that the Secretary of the Interior be, and he hereby is, directed to reinstate applications for coal prospecting permits numbered U-5139, U-5140, U-5141, U-5142, and U-6190 (divided into two units designated U-6190 and U-11719); and it is

FURTHER ORDERED that the Secretary be, and he hereby is, directed to allow plaintiffs thirty (30) days from the date of this Judgment to comply with the requirements imposed in the various "Decisions" in applications U-5140, U-5141, U-5142, U-6190 and U-11719 for issuance to plaintiffs of the portions of said applications heretofore approved and that the Secretary be, and he hereby is, restrained and precluded from refusing to issue said permits on the portions of said applications heretofore approved for any reason whatsoever except failure by the plaintiffs to comply with the specific requirements announced by said "Decisions"; and it is

FURTHER ORDERED that the Secretary be, and he hereby is, directed to make proper determination, supported by an adequate administrative record, as to whether a formal environmental impact statement should be prepared, or whether a negative declaration that such a statement is not required under these circumstances is suffi-

cient, and that the Secretary be, and he hereby is, further directed in connection with the development of such a proper administrative record to afford plaintiffs and other interested persons an opportunity to submit evidence pertaining to relevant issues arising under the National Environmental Policy Act.

DATED this 30th day of March, 1976.

BY THE COURT:

Willis W. Ritter, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. C-392-73

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCES CORPORATION,
Plaintiffs,

vs.

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Separate Motions for Summary Judgment having been filed in the above-entitled matter on behalf of the plaintiffs and on behalf of the defendant and said Motions for Summary Judgment having come on for hearing on March 25, 1975 before the Honorable Willis W. Ritter, Chief Judge, and the Court having heard argument and citation of authorities by counsel for plaintiffs and by counsel for defendant and the Court having requested that counsel for the respective parties submit a written memorandum in support of their respective positions, and said memorandums having been prepared and filed as directed by the Court, and the above-entitled matter having again come on for hearing before the Court on July 14, 1975 on said Motions for Summary Judgment and on plaintiffs' Motion for Leave to File Amended Complaint and the Court again having heard argument of counsel and having further considered the said mem-

oranda and plaintiffs' Motion for Leave to File Amended Complaint having been granted and said Complaint having been filed and the defendant having filed its Answer thereto and the parties through their respective counsel having prepared and filed a Pretrial Order herein, and the Court having signed said Pretrial Order, and the plaintiffs having thereupon renewed their Motion for Summary Judgment and this matter having again come on for hearing before the Court on August 19, 1975 on said Motions for Summary Judgment and counsel for defendant having argued to the Court that factual issues remained with respect to actions of the officials of the Bureau of Land Management and the effect, if any, of such actions on the plaintiffs, and the Motions for Summary Judgment having been denied upon that basis and the above-entitled matter having come on for trial on February 10, 1976 before the Honorable Willis W. Ritter, Chief Judge, and plaintiff Ray H. Albrechtsen having appeared in person and plaintiff Mountain States Resources Corporation having appeared by its president, Ray H. Albrechtsen, and plaintiffs having been represented by their counsel, Reed L. Martineau and Michael R. Carlston of Worsley, Snow & Christensen and defendant having been represented by his counsel, Brent Ward, Assistant United States Attorney, and witnesses having been sworn and testified on behalf of plaintiffs and on behalf of defendant and the respective parties having rested and the matter having been submitted by the respective parties and the Court having considered the testimony of said witnesses and the Court having further considered the entire record in this cause, including the pleadings, stipulations, affidavits, exhibits, interrogatories and answers thereto, and the Court further having considered the argument of counsel, the memoranda filed on behalf of the respective parties and the decisions of the United States

Court of Appeals for the Tenth Circuit in the related, but factually distinguishable case, Dan H. Hunter and Mountain States Resources Corporation, Plaintiffs-Appellants vs. Rogers C. B. Morton, Secretary of the Interior, Defendant-Appellee, D.C. # C-393-73, and the Court, being fully advised in the premises, hereby makes and enters the following

FINDINGS OF FACT

1. Plaintiff Mountain States Resources Corporation is a corporation organized under the laws of Utah having its principal place of business in Utah. Plaintiff Ray H. Albrechtsen is a citizen and resident of Utah.

2. At all times material hereto defendant Rogers C. B. Morton was the Secretary of the Interior of the United States. Morton's current successor as Secretary of the Interior is Thomas Kleppe. The Secretary of the Interior is the chief executive officer of the Department of the Interior and is responsible for the administration of the Mineral Leasing Act of February 25, 1920, as amended, and all regulations promulgated thereunder. The Secretary of the Interior is also responsible to assure that action taken by the Department of the Interior complies with the National Environmental Policy Act.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. This Court has jurisdiction of this action. Venue of this action is properly laid in the Central Division of the above-entitled court.

4. The Secretary of the Interior is, and at all times material hereto was, authorized under 30 U.S.C. § 201(b) to approve or reject applications for coal prospecting permits and to issue coal prospecting permits on public lands to qualified applicants. A permit entitles a prospector to obtain a preference right to lease if the permit

holder demonstrates, within two years from the date of issuance of the permit, that the land prospected contains coal in commercial quantities.

5. On February 19, 1968, pursuant to the provisions of the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. § 201(b), plaintiff Albrechtsen filed with the United States Land Office at Salt Lake City, Utah applications numbered U-5139, U-5140, U-5141, U-5142 and on May 31, 1968 he filed application number U-6190. All of said applications were for coal prospecting permits on lands located in the State of Utah within the area administered by the Utah State Office, Bureau of Land Management. By subsequent assignments dated August 10, 1972 and August 23, 1972, plaintiff Albrechtsen assigned all of his rights in and to said applications to plaintiff Mountain States Resources subject to the reservation of an overriding royalty of 7½ cents per ton.

6. All of the above applications for coal prospecting permits were filed on land open for coal prospecting and leasing under the statutes of the United States and the regulations of the Department of the Interior. Plaintiffs now are, and at all times material have been, fully qualified to own and hold the prospecting permits for coal on the lands referred to in said applications and plaintiffs since filing the applications have always stood ready and able and now stand ready and able to furnish the requisite bond and execute the required stipulations, applications and permits for issuance of said prospecting permits. Plaintiff Albrechtsen was the first qualified applicant for prospecting permits on the subject land.

7. On July 10, 1968 application U-5139 was rejected in its entirety. On July 16, 1968 the Utah State Office of the Bureau of Land Management rejected applications U-5140, U-5141 and U-5142, in part, and approved them

in part. On May 7, 1970 the Utah State Land Office rejected application No. U-6190 in part and approved said application in part, and divided said application into two units, designed as Unit 1 — U-6190 and Unit 2 — U-11719.

8. The approved portions of the foregoing applications include the following lands, to-wit:

Application No. 5140:
TOWNSHIP 22 SOUTH, RANGE 6 EAST, S.L.M.
Section 22: SW ¼ NW ¼, N ½ SW ¼, SE ¼ SW ¼
Containing 160.00 acres.

Application No. 5141:
TOWNSHIP 24 SOUTH, RANGE 5 EAST, S.L.M.
Section 13: NE ¼, E ½ NW ¼, NE ¼ SW¼, N ½ SE ¼, SE ¼ SE ¼
TOWNSHIP 24 SOUTH, RANGE 6 EAST, S.L.M.
Section 7: S ½ NE ¼, SE ¼
Section 8: All
Section 18: Lots 1, 4, 5, 8, E ½ W ½, E ½
Containing 1,920.00 acres.

Application No. 5142:
TOWNSHIP 24 SOUTH, RANGE 5 EAST, S.L.M.
Section 35: SE ¼
Containing 160.00 acres.

Application No. 6190 — Unit 1:
TOWNSHIP 22 SOUTH, RANGE 6 EAST
Section 1: Lots 1, 2, S ½ NE ¼, SE ¼;
Section 12: NE ¼, N ½ SE ¼
Containing 561.00 acres.

Application No. 6190 — Unit 2 (renumbered 11719):
TOWNSHIP 22 SOUTH, RANGE 7 EAST
Section 19: E ½, SE ¼ SW ¼;
Section 20: All
Containing 1,000.00 acres.

9. The "Decisions" announcing the approval in part and rejection in part by the Utah State Land Office of the foregoing applications each provided:

> "Thirty (30) days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken within the time allowed, the case will be closed upon the records of this office, as to the available lands, without further notice."

10. The subject "Decisions" also each provided that the approved areas "may be allowed as to the following lands upon receipt of a . . . bond with approved surety and all copies of the enclosed geological survey stipulations and revised Section 12 of Form 3100-1, Prospecting Application and Permit, properly signed . . ."

11. The Utah State Land Office of the Bureau of Land Management was authorized and had the responsibility to determine whether or not to approve and/or issue coal prospecting applications and/or permits and to issue such permits when approved. During the period of time material to this case Mr. F. S. Kirk was the Chief, Adjudication Branch of the Utah State Land Office of the Bureau of Land Management and in such capacity had full authority as well as the responsibility as an officer and employee of the United States to approve or reject the applications for coal prospecting permits and in cases where they were approved to issue the permits. In the absence or unavailability of Mr. Kirk, Mr. Ed D. Cox as Acting Chief, Adjudication Branch, was similarly authorized and had the responsibility to approve or reject such applications for coal prospecting permits, and where approved, to issue the permits.

12. The "Decisions" from the Utah State Land Office of the Bureau of Land Management were and are vague, ambiguous, misleading and inaccurate and they do not inform applicants for coal prospecting permits in general or the plaintiffs herein in particular of the procedure to be followed with respect to applications which had been approved in part and rejected in part. The decisions did not inform such applicants in general or the plaintiffs herein in particular that they had the right to take an appeal from the rejected portion of permit applications and, at the same time, obtain issuance to themselves of the prospecting permits on the lands as to which the applications had been approved.

13. As a direct result of the ambiguity inherent in the language of the "Decisions," and because they desired to know what their rights were and what they should do, plaintiff Ray H. Albrechtsen, Mr. Dan H. Hunter and their counsel, Mr. H. H. Halliday, sought clarification from the Utah State Land Office of the Bureau of Land Management of their rights and what they should do with respect to the applications for permits which had been approved in part and rejected in part. During the course of a meeting with Mr. F. S. Kirk, Chief, Adjudication Branch of the State Land Office held prior to the time appeals were taken, which meeting was held in the offices of the Utah State Land Office of the Bureau of Land Management, in Salt Lake City and attended by Messrs. Hunter, Albrechtsen and Halliday, they were informed by Mr. Kirk that they had the following choices: (1) accept the "Decisions" as made, meet the requirements of the BLM with respect to issuance of the permits on the portions approved, and waive any further right or claim as to the rejected portions of said applications, or (2) appeal those portions of the decisions which rejected

the subject applications to the Director, Bureau of Land Management. Mr. Kirk advised them that they did not have the right, as the Government has since conceded, to accept the approved lands and appeal only the adverse portions. Mr. Kirk informed them that no action would or could be taken during the appeal period which would jeopardize or interfere in any manner with plaintiffs' right to permits on the granted lands and that in any event the permits for the approved areas would be issued after the conclusion of the appeal, regardless of its outcome. Said statements and representations by Mr. Kirk were made within the scope and the course of his employment and in the course of the exercise of the authority and responsibility of his position and his employment.

14. In reasonable reliance upon the representations and instructions of Mr. Kirk, plaintiffs took no further steps to obtain permits on the lands as to which the applications had been approved. Plaintiffs at all times since receipt of the "Decisions" have been and now are ready, willing and able to meet the conditions precedent to issuance of the permits on the approved lands.

15. Had the plaintiffs known that, contrary to the representations of Mr. Kirk, plaintiffs had the right to proceed to meet the conditions necessary to issuance of the permits on the granted lands and, at the same time, appeal from the adverse portions of the subject decisions, they would have promptly complied with the provisions necessary to obtain issuance of the permits on the portions of the applications which were approved and they would still have appealed as they did from the portions of the decisions which were adverse. Defendant's representatives acknowledged that plaintiffs could have obtained the permits on the approved lands and appealed the adverse decisions and further acknowledged that as

a matter of administrative procedure that such had occurred in cases pertaining to oil and gas exploration. There are no written regulations pertaining to the question of the proper procedures to be employed in cases where an application for a coal prospecting permit is approved in part and rejected in part.

16. Following receipt of the "Decisions" and following their meeting with Mr. Kirk, plaintiffs, in reliance upon the representations and instructions made by Mr. Kirk, submitted timely appeals from the portions of the subject decisions rejecting plaintiff's applications but took no further action with respect to their applications as they involved the granted or approved lands. Regulation 43 C.F.R. § 1840.0-9 did not apply to plaintiffs' situation prior to the time that an appeal was taken from the rejected portions of the applications. There are no other written and officially promulgated regulations which applied to plaintiffs' applications during this same time. It was generally the practice of the defendant to issue permits on approved lands following the conclusion of appeals taken by the applicant on rejected land regardless of the outcome of such appeals but such practice was not the subject of any written regulations.

17. On July 31, 1969 the Director of Bureau of Land Management affirmed the decisions of the Utah Land Office as to applications U-5139, U-5140, U-5141 and U-5142, and granted the right to appeal said decisions to the Secretary of the Interior.

18. Plaintiffs thereupon submitted timely appeals to the Secretary of the Interior from the Director's decision of July 31, 1969.

19. A timely appeal was also made by plaintiffs to the Director of Bureau of Land Management from the Land Office decision on U-6190.

20. Subsequent to the filing of said appeals in 1969 and prior to February 13, 1973, plaintiffs repeatedly inquired of personnel of the Department of the Interior, including Secretary Morton in person, as to the cause of the long delays and inaction with respect to the appeals. These inquiries were also pursued through Utah's congressmen. The plaintiffs were repeatedly assured that a decision would be shortly forthcoming and that no change of policy by the Department of the Interior was anticipated.

21. On February 13, 1973, while the foregoing appeals were still pending, Rogers C. B. Morton, acting as Secretary of the Interior, issued Order 2952 directing the rejection of all applications for coal prospecting permits until further notice, including those which had been and were then still pending.

22. Order 2952 was issued without affording members of the public and, more particularly, plaintiffs named herein, an opportunity to be heard and to comment on the same prior to its issuance and without the adoption of an environmental impact statement as contemplated and required by Section 102(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(C).

23. In Order 2952 the Secretary stated as follows:

> "I have determined that the issuance of this Order is not such a major federal action significantly affecting the quality of the human environment as to require the preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)."

The Secretary, in issuing the foregoing negative declaration, did not affirmatively develop an administrative record setting forth the reasons for this declaration and

did not provide appropriate findings reflecting relevant factors considered by him or the procedures followed by him in reaching this conclusion.

24. The Secretary of the Interior, through his Board of Land Appeals, rejected all of plaintiffs' appeals in their entirety on February 22, 1973 pursuant to Order 2952.

25. Plaintiffs petitioned for reconsideration of the Board of Land Appeals' decisions of February 22, 1973, and on June 1, 1973 the Interior Board of Land Appeals denied the petitions for reconsideration. Plaintiffs have exhausted their administrative remedies.

From the foregoing Findings of Fact the Court hereby makes and enters its

CONCLUSIONS OF LAW

1. Section 2 of the Mineral Leasing Act of 1920 provides for the issuance by the Secretary of the Interior to qualified applicants of prospecting permits "where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits" on unclaimed public lands. 30 U.S.C. § 201(b).

2. Section 2 of the Mineral Leasing Act further provides that if the permittee, during the term of the permit, establishes that "the land contains coal in commercial quantities permittee shall be entitled to a lease . . . for all or part of the lands." 30 U.S.C § 201(b). The Secretary's authority under the Mineral Leasing Act of 1920 to reject or approve coal prospecting permit applications and to issue such permits when approved was properly delegated to officials in the Utah State Land Office, Bureau of Land Management.

3. The language of the "Decisions" approving in part and rejecting in part the plaintiffs' applications was ambiguous and vague and required clarification. Plaintiffs' properly sought clarification of their rights from authorized officers of the United States. Plaintiffs were deprived of due process of law by the defective notice and by the erroneous and misleading information given them by Mr. Kirk.

4. There have been, and now are, no applicable regulations governing procedures to be followed where an application for coal prospecting permit is denied in part and approved in part. Regulation 43 C.F.R. § 1840.0-9 does not apply to plaintiffs' applications because said regulation by its terms governs only decisions that are appealed, and cannot therefore apply to the approved portions of plaintiffs' applications because no appeal was taken as to the approved portions. The regulation further does not apply until an appeal is taken. As was testified to by Mr. Kirk and Mr. Cox, if plaintiffs had complied with the conditions necessary to the issuance of the permits within the 30-day time period, but before the filing of a notice of appeal from the rejected portions of the decisions, the requested permits would have been issued.

5. Mr. F. S. Kirk was acting within his authority as Chief of Adjudication, Utah State Office, Bureau of Land Management and was an officer of the United States authorized to issue or reject applications for coal prospecting permits as well as coal prospecting permits under the Mineral Leasing Act of 1920. The representations made by Mr. Kirk to the plaintiffs as set forth in the Findings of Fact are representations made by Mr. Kirk as an agent of the United States acting within the scope of his employment and in the course of the exercise by him of

the authority and responsibilities of his position and his employment.

6. Plaintiffs relied upon the representations made by Mr. Kirk to their detriment and such reliance was reasonable under the circumstances.

7. Contrary to the representations made, plaintiffs had the right to meet the requirements necessary for issuance of the permits on the approved lands and, at the same time, appeal only from the rejected portions of their applications. Had it not been for the representations of Mr. Kirk, plaintiffs would have done so. With respect to coal prospecting permit applications approved in part and rejected in part, defendant by administrative practice, has generally allowed applicants 30 days from the termination of appeal on the rejected portion within which to satisfy the conditions necessary to issuance of permits on the granted portions of such applications. Plaintiffs are entitled to have their permits processed in accordance with such practice.

8. The Secretary and the United States are bound by the conduct of their agent F. S. Kirk and are estopped to now deny plaintiffs the right to fulfill the conditions precedent to the issuance of the permits as to the approved lands. Estoppel in this case will not serve to unfairly deplete public resources. The Secretary's authorized representatives have already found that, in accordance with the laws and regulations of the United States, plaintiffs are entitled to the issuance of the permit applications on the approved lands.

9. The information and instructions provided by the United States to the plaintiffs with respect to their rights,

including their appeal rights, were erroneous, misleading, ambiguous and incomplete. Plaintiffs' efforts to obtain a clarification of their rights and protect the same were undertaken and pursued in good faith. By the acts and conduct of the agents of the Land Office the plaintiffs were denied due process of law.

10. Justice and equity require that plaintiffs should have the approved portions of their coal prospecting permits reinstated with the Department of the Interior and that they should be given 30 days from the date hereof within which to meet the requirements and conditions precedent to the issuance of such permits.

11. The United States is estopped to deny or refuse to issue plaintiffs' permits on the basis of Order 2952 or on any other basis except as specifically set forth in the conditions necessary for issuance of the permits as explained in the "Decisions." Order 2952 cannot be used as a basis for denial of the approved areas. If plaintiffs elect to withdraw their reinstated appeals, plaintiffs must be given 30 days from the date of such appeals are withdrawn within which to meet the requirements and conditions precedent to the issuance of such permits.

12. The regulations of the Secretary of the Interior authorize the issuance of prospecting permits pursuant to provisions of the regulations and provide that "priority of applications will be determined in accordance with the time of filing." 43 C.F.P. § 3511.1-6(a).

13. The effect of the Secretary's action in issuing Order 2952 has had, has and will have a very negative impact upon the interests of the public in general and upon the plaintiffs in particular. In view of such impact

it is essential to the validity of such an order that a proper and complete administrative record be developed to justify such actions by the Secretary of the Interior. In this regard, conclusory language not supported by a proper administrative record or by sufficient facts, as in the present case, does not meet the requirements of the National Environmental Policy Act. In issuing Order 2952 the Secretary of the Interior failed to develop a proper administrative record as required and the negative declaration contained therein, which is conclusory in nature, is insufficient to satisfy the requirements of the National Environmental Policy Act. The materials and information prepared and issued since the publication of such order by the Secretary fail to provide a proper or sufficient record to comply with the requirement that a reviewable administrative record be made.

14. Because the Secretary has not complied with the requirements of the National Environmental Policy Act, the effect of his Order No. 2952 should be suspended insofar as plaintiffs' applications are concerned until there is proper compliance with the National Environmental Policy Act.

15. Plaintiffs are entitled to judgment in accordance with the Findings of Fact and Conclusions of Law herein. An order should be entered directing reinstatement of the applications and affording plaintiffs an opportunity to comply with the conditions stated in the subject "Decisions" and requiring issuance of the permits as to the portions of the applications heretofore granted, and also requiring the Secretary of the Interior to develop a proper and adequate administrative record to support his actions relating to pending applications for coal prospect-

ing permits and affording plaintiffs an opportunity to be heard before the cancellation of their applications with respect to the rejected portions of the permits.

DATED this 30th day of March, 1976.

BY THE COURT:

Willis W. Ritter, Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1552

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCES CORPORATION,
Plaintiffs-Appellees,

v.

CECIL ANDRUS, Secretary of the Interior,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION (D.C. No. C-392-73-CIV)

Michael R. Carlston (Reed M. Martineau and Craig S. Cook of Worsley, Snow & Christensen, on the brief), for Plaintiffs-Appellees.

Glen R. Goodsell, Attorney, Department of Justice (Peter R. Taft, Assistant Attorney General; Ramon M. Child, United States Attorney; Brent Ward, Assistant United States Attorney; and Raymond N. Zagone and Jacques B. Gelin, Attorneys, Department of Justice; on the brief), for the Defendant-Appellant.

Before McWILLIAMS, BREITENSTEIN and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is an appeal by the Secretary of the Interior from a judgment of the trial court directing the Secretary to reinstate certain applications for coal prospecting permits which has previously been rejected by the Secretary under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 201(b).

In 1968, Ray H. Albrechtsen filed five applications for coal prospecting permits with the Department of the Interior, the applications covering some 12,885 acres of land in the State of Utah. On July 10, 1968, application U-5139 was rejected in its entirety by the Land Office of the Bureau of Land Management (BLM). On July 16, 1968, applications U-5140, U-5141 and U-5142 were rejected, in part, with the further provision that other portions of the applications "may be allowed" on the condition of receipt of a bond with approved surety and the execution of certain stipulations. On May 7, 1970, application U-6190 was also rejected, in part, with the same provision that other portions of the application "may be allowed" upon meeting certain conditions.

Each decision by the BLM relating to Albrechtsen's five applications notified Albrechtsen of his right to appeal as follows:

> Thirty days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken within the time allowed, the case will be closed on the records of this office, as to the available lands, without further notice.

Albrechtsen made a timely appeal from the decisions of the BLM concerning his five applications. In each instance the Director of BLM affirmed the decisions of

the Land Office, and granted the right of further appeal to the Secretary. Such further appeals were made, and were pending, when the Secretary issued Order No. 2952, which provided for a moratorium in the issuance of coal prospecting permits. Order No. 2952 reads as follows:

> In the exercise of my discretionary authority under section 2(b) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(b)), I have decided not to issue prospecting permits for coal under that section until further notice and to reject pending applications for such permits in order to allow the preparation of a program for the more orderly development of coal resources upon the public lands of the United States under the Mineral Leasing Act, with proper regard for the protection of the environment.
>
> Accordingly, no prospecting permits for coal under Section 2(b) of the Mineral Leasing Act, *supra*, shall be issued until further notice. All pending applications for such permits shall be rejected, and any applications submitted in the future shall be promptly rejected.
>
> Nothing in this memorandum shall be deemed to restrict the rights of holders of prospecting permits, issued prior to this directive, to obtain preference right coal leases under section 2(b), *supra*, or to prevent the issuance of competitive coal leases under section 2(a) of the Mineral Leasing Act, as amended (30 U.S.C. § 201(a)).
>
> I have determined that the issuance of this order is not such a major Federal action significantly affecting the quality of the human environment as to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. § 4332(2)(C)).

The Secretary, acting through the Board of Land Appeals, later rejected all of Albrechtsen's applications, basing his rejection on the aforesaid Order No. 2952.

Albrechtsen instituted the present action against the Secretary, seeking to have his several applications reinstated. The gist of the complaint was that the notice of appeal given him by the BLM was ambiguous and misleading, and that he did not realize that he could have appealed from that portion of a decision which rejected his application, and at the same time could have gone forward and complied with the conditions imposed in connection with the parts of his application which the BLM had indicated "may be approved" when certain conditions were met. By amended complaint, Albrechtsen alleged that he had also been misled by BLM officials who had verbally advised him *that he could not appeal part of the BLM's decision, and at the same time comply with the conditions imposed by another part of the BLM's decision.* By answer, the Secretary denied that the BLM's notice of appeal was itself misleading or that BLM officials had given Albrechtsen incorrect information concerning his right of appeal.

After trial, the trial judge ruled in favor of Albrechtsen and against the Secretary. Specifically, the trial court found that the written notice of appeal was ambiguous, and that because of such ambiguity Albrechtsen sought clarification from the BLM and was incorrectly informed by BLM officials that he could not accept, immediately, the favorable portion of the BLM decision and at the same time appeal the unfavorable portions of such decisions. Based apparently on some sort of estoppel, the trial court ordered the Secretary to reinstate Albrechtsen's applications. As to those parts of the applications to which conditions had been attached, the trial

court directed that Albrechtsen be given 30 days to meet such conditions and the Secretary was restrained from refusing to issue such permits for any reason except a failure by Albrechtsen to comply with the specific requirements contained in the BLM decisions. Further, in connection with Order No. 2952, the Secretary was ordered to make a proper determination, supported by adequate administrative record, as to whether, under the National Environmental Policy Act, the Secretary need prepare an Environmental Impact Statement, or in lieu thereof, a negative declaration. The Secretary now appeals the judgment entered against him.

On appeal, there are basically two issues: (1) Whether the trial court erred in ordering the Secretary to reinstate Albrechtsen's applications on the basis of estoppel; and (2) whether the trial court erred in directing the Secretary to make an administrative record, as to the applicability of the National Environmental Policy Act to Order No. 2952. Our study of the matter leads us to conclude that the trial court erred in both particulars, and we therefore reverse, with directions that judgment be entered in favor of the Secretary.

The starting point in our discussion of the matter is *Hunter v. Morton,* 529 F.2d 645 (10th Cir. 1976), which has considerable pertinency to the present controversy. In *Hunter,* three applications for coal prospecting permits were rejected, in part, and as to the remaining portions of the applications the decision in each instance stated that said portion of the application "may be allowed" on the meeting of certain conditions. The written notice of appeal in each of these three decisions was identical to the notice of appeal given Albrechtsen in the instant case. In *Hunter,* the applicant filed his appeal, and the director of the BLM affirmed. Appeal was

then made to the Secretary acting through the Board of Land Appeals. The appeals in *Hunter,* like the appeals in the instant case, were pending before the Secretary when the latter issued Order No. 2952. In *Hunter,* the Secretary rejected the appeals on the basis of Order No. 2952. *Hunter,* the applicant, then brought suit against the Secretary, seeking issuance of the permits applied for, particularly as to those portions of the applications which had not been rejected. The grounds relied on by the applicant in *Hunter* were: (1) That the written notice of appeal set forth in the BLM's decisions was so unclear and ambiguous as to deny the applicant due process; (2) that the BLM under the circumstances is estopped; and (3) that Order No. 2952 is invalid because of noncompliance with the National Environmental Policy Act.

The trial court in *Hunter* granted the Secretary's motion for summary judgment. On appeal, we affirmed, holding that the written notice concerning appeal contained in the decision of the BLM, though not a model of clarity, was nonetheless adequate to apprise the applicant of his appeal rights. We then went on to hold that the doctrine of estoppel could not be applied against the Secretary and that the National Environmental Policy Act did not require the Secretary to file either an impact statement or a negative impact statement before issuing Order No. 2952.

Our decision in *Hunter* was announced while the instant case was pending in the trial court. In an apparent effort to escape the rule of *Hunter,* Albrechtsen then filed in the instant case an amended complaint and attempted, at trial, to make out a different and stronger case for both estoppel and noncompliance with the National Environmental Policy Act. The trial court, on the basis of such showing, was of the view that the in-

stant case was distinguishable from *Hunter.* We do not agree, and, in our view, the present controversy is largely governed by what he said in *Hunter.*

The evidence that BLM officials gave incorrect information to Albrechtsen concerning his appeal rights, thereby invoking the doctrine of estoppel against the Secretary, is in our view woefully weak. There was only the uncorroborated self-serving testimony of Albrechtsen himself. Albrechtsen did call as his own witness two officials of the BLM. They offered testimony concerning BLM practices and procedures, but neither corroborated Albrechtsen's testimony that he had been told by the BLM that he could not appeal the rejected part of his applications, and at the same time go forward on those portions of his applications that "may be allowed" if certain conditions were met. In this general regard, it should be noted that in *Hunter* we said that the written notice in the BLM decision concerning an applicant's appeal rights was sufficient to advise the applicant to take some action as to acreage not rejected if he wanted to move toward a perfected application. In the instant case, Albrechtsen received the same notice concerning his appeal rights as did the applicant in *Hunter.* Albrechtsen would escape the effect of such notice by his uncorroborated testimony that he was given contrary information by some BLM representative. Paraphrasing what he said in *Hunter,* we do not say that the doctrine of estoppel can never be applied against the Secretary, even when it relates to public lands, nevertheless "the facts here advanced do not come close to the requirements which should be imposed." *Id* at 649.

In *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947), an agent of the Federal Crop Insurance Corporation gave some incorrect information to a wheat

grower concerning the extent of his crop insurance coverage, which information was contrary to a federal regulation. The wheat grower suffered a crop failure, and the question was whether the wheat grower was entitled only to the limited coverage afforded by the regulation or to the expanded coverage promised by the local agent. In holding that the incorrect information given by the local agent was not binding on the United States, the Supreme Court declared as follows:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

In *Atlantic Richfield Co. v. Hickel,* 432 F.2d 587, 591-92 (10th Cir. 1970), we recognized the rule which states the doctrine of equitable estoppel binds the Government for conduct of its agents while they are acting within the scope of their employment. However, in that same case we went on to state that "a corollary to the rule is the established principle that the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the United States be waived by unauthorized agents' acts." *Id.*

It is to be noted that we are here concerned with applications for coal prospecting permits on federal lands, in which the nation as a whole has an interest. In *Utah Power & Light Co. v. United States,* 243 U.S. 389, 409

(1917), the Supreme Court stated that as a general rule laches or neglect of duty on the part of officials of the Government is no defense to a suit to enforce a public right or to protect a public interest. Similarly, in *Mountain Power Co. v. Federal Power Commission,* 185 F.2d 491, 497 (D.C. Cir. 1950), the Court of Appeals for the District of Columbia held that the acceptance by the Government of rentals from the assignee of a nonassignable permit did not estop the Government from asserting its title to the land nor did it bar the Government from requiring the assignee to conform to applicable statutes and regulations. In so holding, the Court of Appeals observed:

> The Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials. *Id.*

Based on the foregoing authority, and indeed on our own holding in *Hunter,* we conclude that the trial court erred in invoking the doctrine of estoppel against the Secretary.

In the final paragraph of Order No. 2952, as set forth at the outset of this opinion, the Secretary disclosed that he had determined that his issuance of the order was not such a major federal action significantly affecting the quality of the human environment as to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C). In the trial court, Albrechtsen claimed that, in issuing Order No. 2952, the Secretary had not complied with the National Environmental Policy Act, and that, accordingly, Order No. 2952 was invalid. Such being the case, Albrechtsen argues that his appeals to the Secretary could not be rejected on the basis of Order No. 2952, and should have been

evaluated in the light of the Secretary's discretionary power to grant applications for coal prospecting permits. As above indicated, the trial court by its order and judgment did direct the Secretary to, in effect, conduct a further administrative hearing "to determine the applicability or nonapplicability of the National Environmental Policy Act." In so doing, the trial court also committed error.

In *Hunter* we clearly indicated that Order No. 2952 was not invalid because of the fact that the Secretary did not file an impact statement. In this regard, our pronouncement in *Hunter* controls here. The very purpose of our Order No. 2952 was to cease, for the time being, the issuance of coal prospecting permits in order to allow the preparation of a program for the orderly development of coal resources upon public lands "with proper regard for the protection of the environment." Implicit in Order No. 2952 is that in due time the Secretary would promulgate a new program permitting the orderly development of coal resources on public lands which at the same time would recognize and minimize environmental problems. Such new regulations, 41 Fed. Reg. 2052, did in fact issue on May 17, 1976, and are to be a new subpart to 43 C.F.R. 3040, and a final environmental impact statement was filed in connection with such new regulation. In such circumstances it would be clearly purposeless to now require the Secretary to justify his initial determination. Such was the holding in *Krueger v. Morton*, 539 F.2d 235, 241 (D.C. Cir. 1976), to which we subscribe.

Judgment reversed and cause remanded with directions that the trial court dismiss the action and enter judgment for the Secretary.

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCE CORPORATION, PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

SANFORD SAGALKIN,
Acting Assistant Attorney General,

JACQUES B. GELIN,
GLEN R. GOODSELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1402

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCES CORPORATION, PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-21 to A-30) is reported at 570 F.2d 906. The district court's findings of fact and conclusions of law (Pet. App. A-5 to A-20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1978. The petition for a writ of certiorari was filed on April 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the doctrine of estoppel requires the Secretary of the Interior to reinstate portions of petitioners' applications for coal prospecting permits.

STATEMENT

In 1968, petitioner Albrechtsen filed five applications for coal prospecting permits with the Interior Department's Bureau of Land Management (BLM). The applications covered approximately 12,885 acres in Utah (Pet. App. A-22). The Land Office of the BLM subsequently issued decisions rejecting one of the applications in its entirety and rejecting the remaining four in part, with the notation that other portions of the four applications "may be allowed" if the applicant would provide a bond with approved surety and execute certain stipulations (*ibid.*). The decisions informed the applicant of his right to appeal to the Director of the BLM and of the 30-day time limit for compliance with the stated conditions. Their pertinent language, which is central to the current dispute, was as follows (*ibid.*):

> Thirty days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken within the time allowed, the case will be closed on the records of this office, as to the available lands, without further notice.

Petitioner Albrechtsen submitted timely appeals to the Director of the BLM but did not comply with the prerequisites for approval of portions of the four applications. The Director of the BLM affirmed the decisions of the Land Office and granted petitioner the right of further appeal to the Secretary of the Interior (Pet. App. A-13, A-22 to A-23). Petitioner Albrechtsen filed such appeals and later assigned an interest in his applications to petitioner Mountain States Resources Corporation (Pet. App. A-8, A-13, A-23).

Before deciding the appeals, the Secretary issued Order No. 2952, which imposed a moratorium on the issuance of coal prospecting permits "in order to allow the preparation of a program for the more orderly development of coal resources upon the public lands of the United States * * *, with proper regard for the protection of the environment" (Pet. App. A-23). Relying on Order No. 2952, the Secretary, acting through the Board of Land Appeals, finally rejected petitioners' applications and dismissed the appeals (Pet. App. A-24). Petitioners then filed this suit in the United States District Court for the District of Utah, seeking to have the applications reinstated.

Initially, petitioners complained about the wording of the BLM decisions. They charged that the decisions were ambiguous and had not adequately informed Albrechtscn that he could appeal to the Director and simultaneously attempt to comply with the prerequisites for approval of those portions of the applications that had not been rejected (Pet. App. A-24; III R. 51-53, 57-58).[1] Petitioners also claimed that the BLM decisions had misled Albrechtsen into believing that a timely appeal would toll the running of the 30-day period allowed for compliance with the BLM conditions (III R. 5; see also III R. 98).

Subsequently, petitioners filed an amended complaint in which they alleged that, in response to Albrechtsen's inquiries, BLM officials had explicitly represented that he could not appeal and at the same time provide the required surety bond and stipulations so as to obtain BLM approval of parts of the applications (Pet. App. A-24). Petitioners further alleged that BLM officials had assured Albrechtsen that "no action would or could be taken during the appeal period which would jeopardize or interfere in any manner with" his ultimate receipt of permits for the lands covered by the unrejected portions of the applications (III R. 98).

Petitioners sought a judgment requiring the Secretary to reinstate the appeals and consider them without reference to Order No. 2952. They also sought a declaration that, if petitioners complied with the conditions stated in the BLM decisions, the Secretary

[1] "R." refers to the record on appeal in the court of appeals.

lacked power to deny those portions of the applications that had not been rejected by the BLM.

After an evidentiary hearing, the district court (Judge Ritter) concluded that subordinate BLM officials had given Albrechtsen erroneous advice respecting his appeal rights and, consequently, that petitioners should be given 30 days from the date of the district court's judgment in which to comply with the conditions stated in the original BLM decisions (Pet. App. A-18). The court ruled that, if there was such timely compliance, the Secretary would be estopped from denying the portions of the permit applications not rejected by the BLM (Pet. App. A-17 to A-18).[2]

The court of appeals reversed (Pet. App. A-21 to A-30). It held that the BLM decisions had sufficiently

[2] Apart from the estoppel point, the court held that Order No. 2952 could not serve as the basis for denial of petitioners' applications because the Secretary had issued that Order without filing the environmental impact statement allegedly required by Section 102 of the National Environmental Policy Act, 83 Stat. 853, as amended, 42 U.S.C. (and Supp. V) 4332 (Pet. App. A-18 to A-19). The court of appeals, relying on its decision in *Hunter* v. *Morton*, 529 F. 2d 645 (C.A. 10), rejected this view (Pet. App. A-29 to A-30). Order No. 2952 suspended the issuance of coal prospecting permits while the Secretary prepared a suitable program for the development of coal resources on public lands "with proper regard for the protection of the environment." In May 1976, the Secretary instituted such a program through regulations promulgated under authority granted by the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181-287. See 41 Fed. Reg. 20252 (codified at 43 C.F.R. Part 3040). The Secretary filed a thorough environmental impact statement in connection with these new regulations (Pet. App. A-30). Petitioners have now abandoned the claim of a NEPA violation.

advised Albrechtsen of his appeal rights and of the need to proceed promptly if he wished to perfect the unrejected portions of the permit applications. The court also held that the "uncorroborated self-serving testimony" of petitioner Albrechtsen concerning the advice he allegedly received from BLM officials constituted an insufficient basis for invoking estoppel against the Secretary (Pet. App. A-26 to A-29).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or other courts of appeals, and does not warrant further review.

1. On a prior occasion the court of appeals considered the language used by the BLM to inform applicants for coal prospecting permits of their right to appeal BLM decisions. *Hunter* v. *Morton*, 529 F.2d 645 (C.A. 10), decided in 1976, involved facts essentially identical to those presented here (see Pet. App. A-25 to A-26). Appellants in that case were petitioner Mountain States Resources Corporation and Daniel Hunter (petitioner Albrechtsen's brother). Hunter filed three applications for coal prospecting permits. The BLM rejected one in its entirety and the other two in part. With respect to the unrejected portions of the applications, the BLM stated that the desired permits "may be allowed" on receipt of an approved surety bond and properly executed Geological Survey stipulations. Then, using the same language employed here (see p. 3, *supra*), the BLM decisions informed

Hunter that he had 30 days to meet the stated requirements or appeal to the BLM Director. Like Albrechtsen here, Hunter submitted a timely appeal but made no effort to comply with the BLM conditions. Eventually, the Secretary denied Hunter's applications in reliance on Order No. 2952.

Hunter and Mountain States Resources Corporation filed suit in the United States District Court for the District of Utah, making the same complaint about the allegedly ambiguous wording of the BLM decisions that petitioners raise here. The district court (Judge Anderson) granted summary judgment for the Secretary, and the court of appeals affirmed. After reviewing the disputed paragraph, the court of appeals stated (529 F. 2d at 648):

> The Decisions leave much to be desired in the way of clarity in the notice of right to appeal a portion of the Decisions. This wording is obviously standard for an application rejected in its entirety; however, it is sufficient to advise the applicant to take some action as to the acreage not rejected if he wants to move toward a perfected application. The applicant had a duty to respond or react to the Decision in its entirety if he wanted to prompt administrative action. * * *

The court of appeals in this case relied on its earlier reasoning in *Hunter*, and that reasoning was correct. Nothing in the BLM decisions precluded petitioner Albrechtsen from proceeding on both the appeal and compliance fronts simultaneously. The decisions instructed Albrechtsen that, if he wished to appeal to

the Director, he had to adhere strictly to the regulations governing appeal, 43 C.F.R. Subpart 1842 (1970) (III R. 11-18). Those regulations did not bar Albrechtsen from submitting his appeal and at the same time attempting to fulfill the prescribed prerequisites for partial approval of the permit applications. Neither the regulations nor the BLM decisions indicated that the filing of an appeal would toll the time allowed for compliance with the BLM conditions. Under these circumstances, petitioners should not benefit because of a mistaken failure to provide the necessary bond and signed stipulations within the 30 days allotted by the BLM.

2. The court of appeals also properly rejected petitioners' argument that the Secretary should be estopped from denying the portions of the permit applications not rejected by the BLM, if petitioners now comply with the conditions specified in the BLM decisions. Petitioners allege that BLM officials gave Albrechtsen incorrect advice when he requested guidance after receiving the BLM decisions. The only support for this claim is the testimony of Albrechtsen himself at the district court hearing on February 10, 1976 (Pet. App. A-27). The hearing was held two weeks after the decision of the court of appeals in *Hunter*. In an attempt to avoid the precedential effect of that ruling, petitioners argued in the district court and the court of appeals that Albrechtsen's testimony about the erroneous remarks of BLM officials was sufficient to justify a different result. The BLM officials called as witnesses by petitioners could not recall meeting with Albrechtsen or giving him the faulty instructions he claims to have received. Characterizing the evidence presented by petitioners as "woefully weak," the court of appeals correctly held that Albrechtsen's testimony alone could not support application of the doctrine of estoppel against the Secretary (Pet. App. A-27).[3] A contrary result would permit a finding of estoppel against the government in any situation in which a dissatisfied claimant of public benefits alleges he was misled by a government employee.

In addition, as the court of appeals accurately observed, even if Albrechtsen's testimony were true and BLM officials did dispense faulty advice, this case would not be an appropriate one in which to apply estoppel against the Secretary. Under Section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. 201(b), the Secretary was authorized to exercise his discretion in deciding whether to issue coal prospecting permits.[4] The Secretary was thus entitled to deny Al-

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[3] Notwithstanding petitioners' contention to the contrary (Pet. 11-12), the court of appeals did not reevaluate the witnesses' testimony and thus usurp the fact-finding function of the district court. The court of appeals simply decided, as a matter of law, that in the context of the entire record Albrechtsen's testimony was inadequate to support petitioners' estoppel claim.

[4] Section 2(b) was repealed by the Act of August 4, 1976 (Pub. L. 94-377), 90 Stat. 1085, which replaced the coal prospecting permit system with a system of non-exclusive exploratory licenses. See H.R. Rep. No. 94-681, 94th Cong., 1st Sess. 23 (1975), and S. Rep. No. 94-296, 94th Cong., 1st Sess. 15 (1975).

brechtsen's applications in the first instance. See *Udall* v. *Tallman*, 380 U.S. 1, 4; *Arnold* v. *Morton*, 529 F. 2d 1101, 1105 (C.A. 9); *Hunter* v. *Morton*, *supra*. The original BLM decisions stated only that the unrejected portions of the permit applications "may be allowed" on compliance with the stated conditions. This declaration did not constitute an irreversible commitment to issue the desired permits if Albrechtsen provided the necessary bonds and stipulations. Even if Albrechtsen had complied immediately with the BLM conditions, the Secretary would not have been bound to approve those portions of the applications that had not been rejected previously.

Accordingly, petitioners may claim no property interest in the permits they sought. At worst, the incorrect information allegedly received from BLM officials deprived Albrechtsen of an opportunity to obtain partial approval of his applications before the Secretary issued Order No. 2952. But, as this Court has held, erroneous advice from subordinate federal agents ordinarily does not estop the government. See *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384. See also *Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, 8-9; *United States* v. *California*, 332 U.S. 19, 39-40; *Atlantic Richfield Co.* v. *Hickel*, 432 F. 2d 587, 591-592 (C.A. 10). As the court of appeals concluded in *Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491, 497 (C.A. D.C.), "[t]he Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SANFORD SAGALKIN,
Acting Assistant Attorney General.

JACQUES B. GELIN,
GLEN R. GOODSELL,
Attorneys.

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